



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NUMBER 432 OF 2012**

**JOHN NJENGA MAINA.....APPELLANT**

**VERSUS**

**HUMPHREY KINYUA RUKERIA.....RESPONDENT**

**J U D G M E N T**

1. The Appellant herein who was the Plaintiff in the trial court filed a Plaintiff dated 9<sup>th</sup> February, 2011 against the Respondent. In the plaintiff he claimed that on 12<sup>th</sup> March, 2010, he was lawfully travelling as a passenger aboard a motor cycle registration No. KMCF 438R, along Waiyaki Way at Kangemi area when the Respondent negligently drove motor vehicle Registration No. KBJ 381H that it rammmed into the motor cycle from the rear causing him serious bodily injuries.
2. He further listed the particulars of negligence as set out in paragraph 3 of the plaintiff and relied on the doctrine of *Res Ipsa Loquitor*, the Highway Code and Traffic Act.
3. In his defence, the Respondent has denied ownership of the motor vehicle registration Number KBJ 381H and has put the Appellant to strict proof. He further denied that he Appellant was a passenger of motor cycle registration number KMCF 438R and also denied that he was negligent as alleged. He has the allegations particularized in paragraph 3 of the plaintiff.
4. The Appellant gave evidence as PW 2, he claimed that on 12<sup>th</sup> March 2010 he boarded a motor cycle from his home in Sodom when a speeding motor vehicle hit the motor bike from behind which motor cycle he claimed was moving at 30 Km/hr. He testified that as a result of the accident, he broke his legs, injured his left hand and face and that he was rushed to Kenyatta National Hospital where he received treatment.
5. The Respondent on his part adduced evidence as DW 1. He stated that he was driving motor vehicle registration KBJ 381H from Kikuyu heading to Nairobi. He claimed that he was driving on the inner lane and just before reaching the Kangemi flyover, a motorcyclist emerged from a feeder road and tried to join Waiyaki road so as to proceed to Kabete road which is not legal. He claimed that the motor cycle was being driven at a high speed since it was making an illegal turn while he was driving between 60-70 KM/HR. He further claimed that the rider did not have a reflector jacket, and the pillion passenger did not have a helmet.
6. The parties did not call any other witnesses and they put in their written submissions. In his judgment delivered on 10<sup>th</sup> August, 2012, the learned magistrate dismissed the Appellant's case, hence the appeal

herein.

7. The Appellant aggrieved by the decision of the learned magistrate lodged this appeal on the following grounds: -

- i. That the learned magistrate erred in law and fact in failing to consider adequately or at all the submissions by the Appellant and the authorities submitted.*
- ii. That the learned trial magistrate erred in law and fact in failing to properly consider the issues before her and thereby reaching a decision based on the wrong principles of law.*
- iii. That the learned magistrate erred in law and fact in allowing the Respondent to blame a person who was not a party to the suit for the occurrence of the accident.*
- iv. That the learned magistrate erred in law and fact in the way she weighed the evidence produced before the court on the issue of liability.*
- v. That the learned magistrate erred in law in making estimate on damages which was so inordinately low as to represent an entirely erroneous estimate of the compensation to which the Appellant was entitled to, owing to the nature of the injuries sustained and the residual disabilities thereto.*
- vi. That the learned magistrate erred in law and fact by holding that the evidence adduced did not prove negligence on the part of the Respondent.*
- vii. That the learned magistrate erred in law and fact in dismissing the Appellants claim against the weight of evidence.*

8. When the matter came up for directions on 29<sup>th</sup> April, 2016, the parties' counsels consented to disposing the appeal by way of written submissions. The appellant submitted that the learned magistrate erred in failing to take into account the evidence adduced in court. He argued that the Respondent blamed the rider of the motorcycle for the occurrence of the accident but failed to enjoin him as a party to the suit. He averred that the trial magistrate failed to consider the provisions of Order 1 Rule 15 of the Civil Procedure Rules. Without joining the third party, he claimed that the evidence was uncorroborated when it had not been challenged or controverted since the Respondent failed to initiate 3<sup>rd</sup> party proceedings. He further argued that a party can only depart from its pleadings by amendment thereof and until such an amendment is made, a party cannot be allowed to make submissions in vacuum from the dock or from the witness box especially given that the Respondent allegedly failed to plead in his defence that the cyclist came from a feeder road and was joining the main road to Nakuru.

9. He further asserted that the Respondent ought to have been vigilant on the road, slow down or stop to avoid the accident. He also contended that having pleaded Res Ipsa Loquitor, the explanation on the causation of the accident lay with the driver, the Respondent. He argued that the learned magistrate failed to have a concise statement of the case and points for determination.

10. On quantum, he stated that Ksh.450,000/- proposed to be awarded as general damages is inordinately low. He submitted that Ksh.850,000/- would be adequate. He relied on the cases of Mombasa HCCC No. 298 of 1989, **Kombo Amani Vs Attorney General & 2 others**, Mombasa HCCC No. 718 of 1990 **Teresiah Nyambura Kimaru Vs Michael Kyalo Kiilu** where the Plaintiff was awarded Ksh.750,000/- general damages for pain and suffering in the year 1993 after sustaining a compound fracture of the left tibia/fibula and fracture of right tibia fibular and finally the case of **Charles Amusala Vs Michael N Mbugua & Another**, Nairobi HCCC No. 287 of 1987 who was awarded Ksh.600,000/- in the year 1991.

11. The Respondent on his part argued that the Appellant's evidence in the trial court was very sketchy since he only stated that he boarded a motor cycle and was involved in an accident that he blames the Respondent for. He averred that the police blamed the motor cycle for the accident and he produced the

photographs showing the scene of the accident, which the magistrate appreciated, in coming into a decision that she did. He argued that it was upon the Appellant to prove liability and not for the Respondent to do so. He further stated that the damages that the court would have awarded were very reasonable.

12. Upon careful consideration of the pleadings, memorandum of appeal and the submissions by the counsels, it is evident that an accident occurred on 12<sup>th</sup> March, 2010 involving a motor vehicle registration Number KBF 381H and motor cycle registration Number KMCF 438R along Waiyaki Way at Kangemi. It is also clear that the Appellant was a passenger riding on the motor cycle when the accident happened. It is also apparent from the proceedings and pleadings that the Respondent despite shifting the blame on the motor cycle rider, he failed to enjoin the motor cycle rider as a third party by instituting 3<sup>rd</sup> party proceedings. It is clear from the evidence adduced by the appellant that he solely blamed the Respondent for the accident. The Respondent on the other hand blamed the motor cycle rider who incidentally, illegally, made a turn to enter Kabete Road which allegedly, resulted to the unfortunate accident.

13. In that case, Order 1 Rule 15 of the Civil Procedure Rules comes to play. According to this provision, where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) that he is entitled to contribution or indemnity, then he is required to apply to the court within 14 days after close of the pleadings for leave of the court to issue a third party notice to that effect. In the present case, the Respondent who wished to absorb himself from liability ought to have instituted 3<sup>rd</sup> party proceedings against the motor cycle rider, but his efforts in doing so were not successful and only adduced evidence to the effect that he was not to blame for the accident.

14. The trial court, in my view, erred by solely blaming the accident on a party that was not present in court to counter the blame. From the court record, it is evident that a third party notice was filed in court but his application dated 10<sup>th</sup> August, 2011 for leave to issue third party notice was dismissed on 18<sup>th</sup> November, 2011 for non-attendance. In my view, therefore, in the absence of the third party, the Respondent should shoulder full liability.

15. On quantum, the Appellant pleaded that he suffered compound fractures of the right tibia and fibula, fracture of the distal 1/3 of the left tibia and fibula, laceration of the scalp, friction burns on the left hand and elbow, bruises on the left knee and blood loss, physical and psychological pains. He produced in evidence a medical report by Dr Theophilus Wangata who confirmed that he suffered injuries listed above. In his opinion, the Appellate suffered grievous harm and specifically that he has a chronic joint condition that presents swelling and stiffness. He estimated a permanent incapacity of 200%. The Appellant pleaded with the trial court to award a sum of Ksh.850,000/- while the Respondent submitted in his submissions in the lower court that the court awards Ksh.200,000/-

16. A closer look at the authorities relied on by the Appellant, the Plaintiff in **Kombo Amani Vs Attorney General & 2 Others**, suffered fractures of the shafts of tibia/fibula bones of both legs and was awarded Ksh.750,000/-. In the case of **Teresa Nyambura Kimoru Vs Michael Kyalo Kiilu**, Mombasa HCCC No. 718 of 1990, she sustained fractures of the left tibia/fibula and fracture of right tibia/fibula and was awarded Ksh.750,000/-. Finally in the case of **Charles Amusala Vs Michael N. Mbugua & another**, HCCC No. 287 of 1987, the Plaintiff sustained a compound fracture 1/3 of the left tibia/fibula and comminuted fracture of the left upper tibia/fibula and was awarded Ksh.600,000/-. Going by the cited cases and considering the injuries suffered, I believe a sum of Ksh.750,000/- for general damages would be sufficient. The appellant is also awarded a sum Ksh.2500/- for special damages which was specifically pleaded and strictly proved.

17. It is because of the above finding that I make the following orders in this judgment: -

*a. The dismissal of the Appellant's case is hereby set aside and substituted with an order that judgment be and is hereby entered for the Appellant for the Ksh.750,000/- in general damages and Ksh.2,500/- in special damages with interest from the date of filing of the suit for the special damages and from the date of judgment for the general damages.*

***b. The Appellant is awarded the costs of the lower court case and the costs of the appeal herein.***

Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of September, 2016.

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**L NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Appellant***

..... ***for the Respondent***